Sime Darby Bhd & Ors v Dato' Seri Ahmad Zubair @ Ahmad Zubir bin Hj Murshid & Ors (Tun Musa Hitam & Ors, third parties)

HIGH COURT (KUALA LUMPUR) — SUIT NO SUIT NOS D-22NCC-2379 OF 2010 AND D-22NCC-2391 OF 2010
LEE SWEE SENG JC
6 MARCH 2012

Civil Procedure — Striking out — Application for — Third party notices and statements of claim — Whether first and second defendants had right to claim indemnity or contribution from third parties — Whether claim disclosed reasonable cause of action — Whether claim abuse of court's process — Rules of the High Court 1980 O 16 r 1 & O 18 r 19

Civil Procedure — Third party proceedings — Contribution from third parties — Whether first and second defendants had right to claim contribution from third parties — Whether third parties were joint tortfeasors — Rules of the High Court 1980 O 16 r 1 & O 18 r 19

Civil Procedure — Third party proceedings — Indemnity — Whether first and second defendants had night to claim indemnity — Whether third parties had statutory obligation to idemnity — Whether third parties were joint tortfeasor — Rules of the High Court 1980 O 16 r 1 & O 18 r 19

The plaintiffs, a multinational corporation conglomerate with diversified businesses in Malaysia and 20 other countries, commenced two suits, namely the Qatar Project suit and the Bakun Project suit against the defendants, its keys directors and officers. The plaintiffs claimed that the defendants were in breach of their fiduciary duties as executive or senior directors of the plaintiffs and negligent in the discharge of their duties. The plaintiffs' claims against the first and second defendants in both suits primarily focused on their operations and implementation of the projects they were expected to lead. In response the defendants in both suits took the stand that they were not liable as all their actions had been approved by the plaintiffs and/or the specialised committees, which were set up with specialised tasks to perform. The first and second defendants in both suits ventured further and claimed that if they were liable as claimed, then the members of the various committees who had approved and authorised their actions should also be held liable. The first and second defendants thus issued third party notices pursuant to O 16 r 1 of the Rules of the High Court 1980 against all those persons who were 'inextricably involved'

with the decision making process of the plaintiffs and who had a collective responsibility for the conception and implementation of the Qatar Project and the Bakun Project ('the third parties'). By way of these third party notices the first and second defendants sought to claim an indemnity or contribution from the third parties against the plaintiffs' claim. Following the third party notices, the first and second defendants had served their statements of claim on the third parties. The third parties now applied through various summonses in chambers to strike out the third party notices and third party claims taken out by the first and second defendants. The third parties claimed that they had no statutory obligation to indemnify the first and second defendants or any of the defendants to the two suits and that as non-executive directors they were exempt from liability.

Held, striking out the third party notices and statements of claim with costs to be taxed failing agreement:

(1) This court found that none of the relationships that gave rise to an indemnity or an obligation to indemnify, which was recognised either in law or in equity, existed between any of the third parties and the first and second defendants. The third parties had never requested the first and second defendants to act or commit any of the wrongs as alleged by the plaintiffs in the main action. Further, the first and second defendants' contention that the right to indemnity arose from some principles of natural justice was also misconceived and not supported by authorities. As such, there was no plausible case made out for any indemnity either as alleged by the first and second defendants or otherwise (see paras 45, 48, 54–55).

(2) Under Malaysian law, the first and second defendants were only entitled to claim a contribution from the third parties towards the satisfaction of any damages that this court may make in favour of the plaintiffs, if the third parties were in law joint tortfeasors with the first and second defendants. In order for the third party to be a joint tortfeasor with the defendants, there should be more than passive presence and participation in the decision making process and there must be the element of active and purposeful procurement of the tort. However, the third parties in the present case were non-executive directors who were not involved, directly or indirectly, in the operational or implementation issues in respect of the two projects. In any case the third parties' involvement in the two projects had not been pleaded by the first and second defendants. Further the third parties in the current proceedings only owed a duty of care to the plaintiffs and not to the first and second defendants (see paras 90–91).

(3) Although the Companies Act 1965 did not differentiate between executive and non-executive directors, in the present case where the plaintiffs were suing some but not all of their directors for losses arising

out of breach of fiduciary duties and negligence they reserved the right and liberty to decide who amongst the directors should be held responsible (see para 104).

(4) The first and second defendants' claims against the third parties did not disclose a reasonable cause of action and were obviously unsustainable. As such, to allow the action against the third parties to continue would be an abuse of the court's process (see para 142).

[Bahasa Malaysia summary

Plaintif-plaintif, sebuah syarikat korporat konglomerat multinasional dengan pelbagai perniagaan di Malaysia dan 20 negara lain, telah memulakan dua guaman, iaitu guaman projek di Qatar dan guaman projek Bakun terhadap defendan-defendan, pengarah-pengarah dan pegawai-pegawai utamanya. Plaintif-plaintif mendakwa bahawa defendan-defendan telah melanggar kewajipan fidusiari mereka sebagai eksekutif atau pengarah kanan plaintif-plaintif dan cuai dalam melaksanakan kewajipan mereka. Tuntutan plaintif-plaintif terhadap defendan-defendan pertama dan kedua dalam kedua-dua guaman khususnya memberi fokus kepada operasi mereka dan pelaksanaan projek-projek yang dikatakan adalah diketuai oleh mereka. Sebagai jawapan defendan-defendan dalam kedua-dua guaman mengambil pendirian bahawa mereka tidak bertanggungjawab kerana semua tindakan mereka telah diluluskan oleh plaintif-plaintif dan/atau jawatankuasa khas, yang ditubuhkan dengan tugasan khusus untuk dilaksanakan. Defendan-defendan pertama dan kedua dalam kedua-dua guaman meneroka selanjutnya dan mengatakan jika mereka bertanggungjawab sebagaimana yang didakwa, maka ahli-ahli pelbagai jawatankuasa yang telah meluluskan dan memberi kuasa terhadap tindakan-tindakan mereka juga patut dipertanggungjawabkan. Defendan-defendan pertama dan kedua dengan itu telah mengeluarkan notis pihak ketiga menurut A 16 k 1 Kaedah-Kaedah Mahkamah Tinggi 1980 terhadap semua yang terlibat secara langsung dengan proses membuat keputusan plaintif-plaintif dan yang mempunyai tanggungjawab kolektif untuk konsepsi dan pelaksanaan projek Qatar dan projek Bakun ('pihak ketiga'). Melalui notis-notis pihak ketiga tersebut defendan-defendan pertama dan kedua memohon untuk menuntut indemniti atau sumbangan daripada pihak ketiga terhadap tuntutan plaintif-plaintif. Berikutan notis-notis pihak ketiga, defendan-defendan pertama dan kedua telah menyampaikan penyataan tuntutan mereka ke atas pihak ketiga. Pihak ketiga kini memohon melalui pelbagai saman dalam kamar untuk membatalkan notis pihak ketiga dan tuntutan pihak ketiga yang dimulakan oleh defendan-defendan pertama dan kedua. Pihak ketiga mendakwa mereka tiada kewajipan statutori untuk membayar ganti rugi kepada defendan-defendan pertama dan kedua atau mana-mana defendan dalam dua guaman itu dan bahawa sebagai pengarah bukan eksekutif mereka dikecualikan daripada liabiliti.

Diputuskan, membatalkan notis pihak ketiga dan penyataan tuntutan dengan kos ditetapkan cukai jika persetujuan gagal:

(1) Mahkamah ini mendapati bahawa tiada hubungan yang menimbulkan indemniti atau tanggungjawab untuk membayar ganti rugi, yang diiktiraf dari segi undang-undang atau ekuiti, yang wujud antara mana-mana pihak ketiga dan defendan-defendan pertama dan kedua. Pihak ketiga tidak pernah meminta defendan-defendan pertama dan kedua untuk bertindak atau melakukan apa-apa kesalahan sebagaimana yang dikatakan oleh plaintif-plaintif dalam tindakan utama. Selanjutnya, hujah defendan-defendan pertama dan kedua bahawa hak indemniti timbul daripada prinsip keadilan asasi juga telah disalah tanggap dan tidak disokong oleh pihak berkuasa. Oleh itu, tiada kes kukuh ditunjukkan untuk apa-apa indemniti sebagaimana dikatakan oleh defendan-defendan pertama dan kedua atau sebaliknya (lihat perenggan 45, 48, 54–55).

(2) Di bawah undang-undang Malaysia, defendan-defendan pertama dan kedua hanya berhak untuk menuntut sumbangan daripada pihak ketiga untuk menampung apa-apa ganti rugi bahawa mahkamah ini mungkin akan berpihak kepada plaintif sama dengan defendan-defendan pertama dan kedua. Bagi tujuan pihak ketiga menjadi pelaku tort bersama dengan defendan-defendan, perlu ada kewujudan dan penglibatan yang lebih pasif dalam proses membuat keputusan dan perlu terdapat elemen perlakuan tort yang aktif dan bertujuan. Walau bagaimanapun, pihak ketiga dalam kes ini adalah pengarah bukan eksekutif yang tidak terlibat, secara langsung atau tidak langsung, dalam operasi atau pelaksanaan isu-isu berkaitan dua projek tersebut. Dalam apa keadaan penglibatan pihak ketiga dalam dua projek itu tidak diplidkan oleh defendan-defendan pertama dan kedua. Selanjutnya pihak ketiga dalam prosiding ini hanya mempunyai kewajipan berjaga-jaga kepada plaintif-plaintif dan bukan kepada defendan-defendan pertama dan kedua (lihat perenggan 90–91).

(3) Walaupun Akta Syarikat 1965 tidak membezakan antara pengarah eksekutif dan bukan eksekutif, dalam kes di mana plaintif-plaintif menyaman beberapa tetapi bukan semua pengarah mereka kerana kerugian yang timbul daripada pelanggaran kewajipan fidusiari dan kecuaian mereka tidak menggunakan hak dan kebebasan mereka untuk memutuskan antara pengarah manakah yang patut dipertanggungjawabkan (lihat perenggan 104).

(4) Tuntutan-tuntutan defendan-defendan pertama dan kedua terhadap pihak ketiga tidak menunjukkan kausa tindakan yang munasabah dan jelas tidak dapat dikekalkan. Oleh itu, untuk membenarkan tindakan terhadap pihak ketiga untuk diteruskan akan merupakan penyalahgunaan proses mahkamah (lihat perenggan 142).]

Notes

For cases on application for striking out, see 2(3) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 7478–7481.

For cases on contribution from third party, see 2(3) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 8615–8616.

For cases on indemnity, see 2(3) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 8622–8624.

Cases referred to

Amanah Scotts Properties (KL) Sdn Bhd & Ors v Ooit Meng Khin & Ors (No 2) [2011] MLJU 441; [2011] 1 LNS 500, HC (refd)

Amon v Bobbett (1889) 22 QBD 543, CA (refd)

Ashhurs v Mason; Ashhurst v Fowler (1875) LR 20 Eq 225, Ch D (refd)

AWA ltd v Daniels trading as Deloitte Haskins & Sells and others (1992) 7 ACSR 759, SC (refd)

Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd [1993] 3 MLJ 36, SC (refd)

Barings plc and others (No 5), Secretary of State for Trade and Industry, Re v Baker and others (No 5) [1999] 1 BCLC 433, Ch D (refd)

Birmingham and District Land Co ltd v London and North Western Rly Co (1886) 34 Ch D 261, CA (refd)

BPI International Finance Ltd (formerly known as Ayala Finance (HK) ltd) v Tengku Abdullah Ibni Sultan Abu Bakar [2009] 4 MLJ 821, CA (refd)

Burke & Anor v LFOT Pty Ltd (2002) 1 CLR 282, HC (refd)

Byrne v Brown (1889) 22 QBD 657, CA (refd)

CBS Songs Ltd v Amstrad Consumer Electronics Plc [1988] AC 1013, HL (refd)

Chan Kit Hong & Anor v Jayakumar & Anor [1984] 2 MLJ 271, FC (refd)

Charitable Corporation, The v Sir Robert Sutton and others (1742) 26 ER 642, Ch (not folld)

City Equitable Fire Insurance Company, Limited, Re [1925] 1 Ch 407, CA (refd)

Credit Lyonnais Bank Nederland NV (now Generale Bank Nederland NV) v Export Credit Guarantee Department [1998] 1 Lloyd's Rep 19, CA (refd)

Eastern Shipping Co v Quah Beng Kee [1924] AC 177, PC (refd)

Federal Flour Mills Ltd v Owners of The Vessel 'Ta Tung' & Anor [1970] 2 MLJ 147 (refd)

Hay v Carter [1935] Ch 397, CA (refd)

Koursk, The (1924) 18 Ll L Rep 153; [1924] P 140, CA (refd)

Lee Kuan Yew v Devan Nair (Straits Times Press (1975) Ltd & Anor, third parties) [1993] 1 SLR 723, HC (refd)

Lembaga Kemajuan Wang Simpanan Pekerja v Rubfil Sdn Bhd & Ors [2005] 7 MLJ 175, HC

Liu, Ren-Shuenn v Lee, Chiu-Pin [1999] 2 CLJ 35, HC (refd)

Mat Abu bin Man v Medical Superintendent, General Hospital, Taiping, Perak & Ors [1989] 1 MLJ 226; [1989] 1 CLJ 137, SC (refd)

Multi-Code Electronics Industries (M) Bhd and Another v Gordon Toh Chun Toh and Others [2011] 1 LNS 896, HC (folld)

Ng Kian Chong & Ors v Saw Seng Kee [1994] 3 MLJ 691; [1994] 4 CLJ 857, HC (refd)

Nganthavee Teriya @ Gan Hui Poo v Ang Yee Lim Lawrence and others [2003] 2 SLR 361, HC (refd)

PLG Research Ltd v Ardon International Ltd & Ors [1993] FSR 197 (refd)

Pacific Asia Leasing (M) Bhd v Senanti Motors Sdn Bhd & Anor (YM Tunku Kamil Ikram, third party) [1992] 2 MLJ 364; [1992] 3 CLJ 1621, HC (refd)

Pegang Mining Co Ltd v Choong Sam & Ors [1969] 2 MLJ 52, PC (refd)

PlanAssure PAC (formerly known as Patrick Lee PAC) v Gaelic Inns Pte Ltd [2007] 4 SLR 513, HC (refd)

Ramskill v Edwards (1886) 31 Ch D 100, Ch D (distd)

Ravichanthiran a/l Ganesan v Percetakan Wawasan Maju Sdn Bhd & Ors [2008] 8 MLJ 450, HC (refd)

Royal Brompton Hospital NHS Trust v Hammond and others (Taylor Woodrow Construction (Holdings) Ltd, Pt 20 defendant) [2002] 2 All ER 801, HL (refd)

Saripah bte Manap & Ors v Emar Sdn Bhd (in dissolution) & Ors [1998] 1 MLJ 323, HC (refd)

Sheffield Corp v Barclay [1905] AC 392, HL (refd)

Shepheard v Bray [1906] 2 Ch 235, Ch D (distd)

Sri Kelangkota-Rakan Engineering Sdn Bhd & Ors v Arab-Malaysian Prima Realty Sdn Bhd [2001] 1 MLJ 324; [2001] 1 CLJ 779, CA (refd)

Syarikat Prema v Tastax Raya Sdn Bhd [2003] 6 CLJ 60, HC (refd)

Westmind Packing Services Ltd, Secretary of State for Trade & Industry, Re v Griffiths & Ors [1998] 2 BCLC 646, CA (refd)

Yeung Kai Yung v Hong Kong And Shanghai Banking Corpn [1981] AC 787, PC (refd)

Legislation referred to

Civil Law Act 1956 ss 10(1), 10(1)(c)

Civil Liability (Contribution) Act 1978 [UK] ss 1(1), 6(1)

Companies Act 1965 ss 132, 132(1), 140(1)

Company Directors Disqualification Act 1986 [UK] s 6

Directors Liability Act 1890 [UK] ss 3, 5

Employees Provident Fund Act 1991 s 46

Law Reform (Married Women and Joint Tortfeasor) Act 1935 [UK] s 6

Rules of the High Court 1980 O 16 rr 1, 1(1), 1(1)(a), 1(1)(b), 1(1)(c), 8(1), (1)(a), (2), O18 r 19, O 18 r 19(1)(a), (b), (c), (d), O 34, Forms 22, 23

Trade Practices Act 1974 [AU] ss 52, 82

Robert Lazar (Rabindra Nathan and Rodney Gomez with him) for the plaintiffs in Suit No D-22NCC-2379 of 2010 (the first defendant proceedings).

Robert Lazar (Rabindra Nathan and Rodney Gomez with him) for the plaintiffs and 13th third party in Suit No D-22NCC-2379 of 2010 (the second defendant proceedings).

Robert Lazar (Rabindra Nathan and Rodney Gomez with him) for the plaintiffs in Suit No D-22NCC-2391 of 2010 (the first defendant proceedings).

R Mohara Krishnan (V Varunnath with him) for the first defendant in Suit No D-22NCC-2379 of 2010 (the first defendant proceedings).

Satharuban (S Murali and Sivaganish with him) for the second defendant in Suit No D-22NCC-2379 of 2010 (the first defendant proceedings).

Ambiga Sreenevasan (Mahaletchumi Balakrishnan with her) (Sreenevasan) for the first, second, fourth and fifth third party in Suit No D-22NCC-2379 of 2010 (the first defendant proceedings).

Darryl Goon (Maidzuara Mohammed with him) (Raja, Darryl & Loh) for the sixth, seventh, eighth, tenth and 12th third party in Suit No D-22NCC-2379 of 2010 (the first defendant proceedings).

Gopal Sreenevasen (Sreenevasan Young) for the ninth and 13th third party in Suit No D-22NCC-2379 of 2010 (the first defendant proceedings).

Nahendran Navaratnam (Wong Wye Wah, Swinder Sing, Cahaya Narimas Faad with him) (Kadr, Andri & Partners) for the third, 11th, 14th and 15th third party in Suit No D-22NCC-2379 of 2010 (the first defendant proceedings).

Lim Tuck Sun (Firdaus Husni with him) (Chooi & Co) for the 16th and 17th third party in Suit No D-22NCC-2379 of 2010 (the first defendant proceedings).

SK Tan for the Ace Synergy in Suit No D-22NCC-2379 of 2010 (the first defendant proceedings).

Darryl Goon (Maidzuara Mohammed with him) (Raja, Darryl & Loh) for the first and second third party in Suit No D-22NCC-2379 of 2010 (the second defendant proceedings).

David Morais (James Khong with him) (M David Morais) for the third, fourth, fifth, sixth and 12th third party in Suit No D-22NCC-2379 of 2010 (the second defendant proceedings).

Lim Tuck Sun (Chooi & Co) for the ninth and tenth third party in Suit No D-22NCC-2379 of 2010 (the second defendant proceedings).

Gopal Sreenevasen (Sreenevasan Young) for the seventh third party in Suit No D-22NCC-2379 of 2010 (the second defendant proceedings).

Nahendran Navaratnam (Wong Wye Wah, Swinder Sing, Cahaya Narimas Faad with him) (Kadr, Andri & Partners) for the eighth and 11th third party in Suit No D-22NCC-2379 of 2010 (the second defendant proceedings).

SK Tan for the Ace Synergy in Suit No D-22NCC-2379 of 2010 (the second defendant proceedings).

R Mohara Krishnan (V Varunnath with him) for the first defendant in Suit No D-22NCC-2391 of 2010 (the first defendant proceedings).

Satharuban (S Murali and Sivaganish with him) for the second defendant in Suit No D-22NCC-2391 of 2010 (the first defendant proceedings).

Ambiga Sreenevasan (Mahaletchumi Balakrishnan with her) (Sreenevasan) for the first, second, fourth and fifth third party in Suit No D-22NCC-2391 of 2010 (the first defendant proceedings).

Darryl Goon (Maidzuara Mohammed with him) (Raja, Darryl & Loh) for the sixth, seventh, eighth, tenth and 12th third party in Suit No D-22NCC-2391 of 2010 (the first defendant proceedings).

Gopal Sreenevasen (Sreenevasan Young) for the ninth and 13th third party in Suit No D-22NCC-2391 of 2010 (the first defendant proceedings).

Nahendran Navaratnam (Wong Wye Wah, Swinder Sing, Cahaya Narimas Faad with him) (Kadr, Andri & Partners) for the third, 11th, 14th and 15th third party in Suit No D-22NCC-2391 of 2010 (the first defendant proceedings).

Lim Tuck Sun (Firdaus Husni with him) (Chooi & Co) for the ninth and tenth third party in Suit No D-22NCC-2391 of 2010 (the first defendant proceedings).

SK Tan for the Ace Synergy in Suit No D-22NCC-2391 of 2010 (the first defendant proceedings).

Robert Lazar (Rabindra Nathan and Rodney Gomez with him) for the plaintiff, 12th and 13th third party in Suit No D-22NCC-2391 of 2010 (the second defendant proceedings).

Darryl Goon (Maidzuara Mohammed with him) (Raja, Darryl & Loh) for the first and second third party in Suit No D-22NCC-2391 of 2010 (the second defendant proceedings).

David Morais (James Khong with him) (M David Morais) for the third, fourth, fifth and sixth third party in Suit No D-22NCC-2391 of 2010 (the second defendant proceedings).

Lim Tuck Sun (Chooi & Co) for the ninth and tenth third party in Suit No D-22NCC-2391 of 2010 (the second defendant proceedings).

Gopal Sreenevasen (Sreenevasan Young) for the seventh third party in Suit No D-22NCC-2391 of 2010 (the second defendant proceedings).

Nahendran Navaratnam (Wong Wye Wah, Swinder Sing, Cahaya Narimas Faad with him) (Kadr, Andri & Partners) for the eighth and 11th third party in Suit No D-22NCC-2391 of 2010 (the second defendant proceedings).

SK Tan for the Ace Synergy in Suit No D-22NCC-2391 of 2010 (the second defendant proceedings).

Lee Swee Seng JC:

PROLOGUE

[1] The plaintiffs have sued the defendants for losses arising out of breach of fiduciary duties as executive directors or senior executives of one or more of the plaintiffs as well as for negligence in the discharge of duties and for unauthorised payments. It is a colossal claim made by a multinational conglomerate against its key executive directors and officers. The defendants have taken a stand that they are not liable as all their actions have been approved by the Boards and Committees of the plaintiffs. The defendants were merely carrying out on the base what had been approved at the Board. The first and second defendants ventured further and claimed that if indeed they are liable as claimed, then the whole Board members and members of the various committees who had approved and authorised their actions are to be held liable.

[2] Perhaps it is an extension of the aphorism that he also serves who only stands and wait or more appropriately in the boardroom context, he also serves and hence are liable who only sits and signs the various board papers. There is also the appealing argument advanced by the first and second defendants — that of collective responsibility of the whole board.

PARTIES

[3] There are two suits which applications by the third parties to set aside the third party notices and statements of claim are being heard together. The first suit in Suit No D-22NCC-2379 of 2010 involves the Qatar Project and shall be referred to as the Qatar Project suit. The second suit in Suit No D-22NCC-2391 of 2010 relates to the Bakun Project and shall be referred to as the Bakun Project suit.

The plaintiffs

[4] The first and second plaintiffs in the Qatar Project suit are also the first and second plaintiffs in the Bakun Project suit. Likewise the first and second defendants are the same first and second defendants in both suits.

[5] The first plaintiff, Sime Darby Bhd ('Sime Darby'), is a public listed company listed on Bursa Malaysia Bhd. In November 2007, Kumpulan Sime Darby Bhd ('KSD'), Golden Hope Plantations Bhd and Kumpulan Guthrie Bhd merged to form Sime Darby. Sime Darby can clearly be described as a multinational corporation and conglomerate with diversified businesses in Malaysia and 20 other countries. Its core businesses are plantation, property, industrial, motors, energy and utilities and healthcare. Sime Darby is the ultimate holding company of the entire Sime Group of Companies ('the Sime Group') which comprises some 560 companies as at 30 September 2010.

[6] The second plaintiff Sime Darby Engineering Sdn Bhd ('Sime Darby Engineering') is a wholly-owned subsidiary of Sime Darby. Sime Darby Engineering is a member of the Sime Group of companies. It is part of the group of companies within the Energy and Utilities Division ('E&U Division') and provides engineering, procurement, construction, installation, hook-up and commissioning services relating to the oil and gas industry.

[7] The third plaintiff in the Qatar Project suit is Sime Darby Energy Sdn Bhd is ('Sime Energy') which is a wholly-owned subsidiary of Sime Darby and a member of the Sime Group. It is part of the group of companies within the E&U Division and an investment holding company, which provides operating and maintenance services to an independent power producer.

[8] The fourth plaintiff in the Qatar Project suit is Sime Darby Marine Sdn Bhd ('Sime Marine'). It is a wholly-owned subsidiary of Sime Darby and a member of the Sime Group.

[9] The fifth plaintiff in the Qatar Project suit is Sime Darby Marine (Hong Kong) Pte Ltd ('Sime Marine HK') incorporated under the laws of Hong Kong. It is a wholly-owned subsidiary of Sime Darby and a member of the Sime Group. It is an investment holding company.

[10] The second plaintiff ('Sime Engineering') is a wholly-owned subsidiary of Sime Darby and a member of the Sime Group. It carries on engineering, project management services and land based construction to the petroleum industry, power plant and infrastructure works.

[11] The third plaintiff in the Bakun Project suit is Sime Darby Holdings Bhd ('Sime Holdings'). It is a wholly-owned subsidiary of Sime Darby and a member of the Sime Group. Sime Holdings is an investment holding company and provides management services to related parties. It is also involved in the marketing of and acts as agents for commodities.

[12] The fourth plaintif in the Bakun Project suit is Sime Darby Energy Sdn Bhd which is also the third plaintiff in the Qatar Project suit.

The defendants

[13] Only the first and second defendants would be relevant for the present consideration as they are the ones who had taken out third parties proceeding against the various third parties set out below.

[14] The first defendant, Dato' Seri Ahmad Zubair ('Zubair') was the President and Group Chief Executive of the Sime Group and a member of the Board of Directors of Sime Darby. He was at all material times a full-time working director, pursuant to a service contract. He occupied the highest executive position in the Sime Group. He was also a Director of KSD and Sime Engineering and sat in the Executive Committee, Risk Management Committee, Group Management Committee of KSD, Supervisory Committee of E&U Division of some of the plaintiffs.

[15] The second defendant Dato' Mohamad Shukri bin Baharom ('Shukri') was at all material times the Executive Vice President of the E&U Division of the Sime Group, thereby occupying the highest executive position in that Division. He was also a Board member of Sime Engineering, Sime Energy, Sime Marine and Sime Marine HK. He also sat in various committees of the

plaintiffs.

The third parties

[16] The third parties were or remain directors of one or more of the plaintiffs and/or members of the Board Committees.

[17] Quite apart from being directors of the plaintiffs and/or their predecessors namely KSD, Sime Engineering Services Bhd ('SESB') the listed predecessor of Sime Holdings and the Main Board of Sime Darby, most of the third parties were members of the Board Committees set up with specialised tasks to perform. These committees were the Supervisory Committee, Audit Committee, Risk Management Committee and Tender Committee. They were all non-executive directors of one or more of the plaintiffs.

[18] There were all together 22 third parties brought by the first defendant and 13th third parties brought by the second defendant in both the Qatar Project suit and the Bakun Project suit. The 13th third party brought by the second defendant in the Bakun Project suit is also the third plaintiff in the main suit.

PROBLEM

[19] Briefly and broadly, as summarised by the third parties' counsel, the plaintiffs' claim in Suit No D-22NCC-2379 of 2010 as spelt out in its statement of claim dated 23 December 2010 in the Qatar Project suit against the first and second defendants is as follows:

(a) gross negligence and incompetence in entering into and implementing the Qatar Petroleum Project ('QP Project');

(b) concealment and manipulation of information in relation to the QP Project;

(c) negligence in committing Sime Darby Engineering to the Maersk Oil Qatar Project ('MOQ Project') and general incompetence in the management of the MOQ Project;

(d) dishonest representation by the second defendant on the MOQ Project;

(e) gross negligence by the second defendant on the MOQ Project;

(f) gross negligence by the second defendant in recommending what was called 'Project Marine', which recommendation was approved by the first defendant;

(g) non-disclosure of material information in relation to shipbuilding

A contracts entered into with the MLC Group's, a group with no solid financial track record (paras 134–42);

(h) misrepresentation of KPMG's financial due diligence report to the Board of the first plaintiff (paras 143–144);

B (i) misrepresentation of MLC Group's financial track record (paras 150–159);

(j) poor contract management and the inclusion of contractual amendments unfavourable to the fourth plaintiff (paras 170–172);

C (k) improper waiver of conditions precedent in the shipbuilding contracts which were meant to protect the fourth plaintiffs interests and waiver of the requirement to provide bank guarantees (paras 173–181); and

(l) general breach of directors' duties leading to the non-delivery of vessels under the shipbuilding contracts (paras 182–185).

D

[20] A summary by the third parties' counsel of the plaintiffs' statement of claim in Suit No D-22NCC-2391 of 2010 dated 24 December 2010 in relation to the Bakun Project suit shows that their claim against the first and
E second defendants is as follows:

(a) mismanagement of civil works in relation to the Bakun Hydro-Electric Project ('Bakun Project') (paras 29–30);

(b) failure to incorporate the joint venture vehicle, MCHJV (paras 31– 35);

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(c) concealment of a package 1B subcontract agreement, the fact that it led to a change from an existing unit contract rate of RM824m to a lump sum contract price of RM1.499 billion in 2008 (paras 36–45), leading to the imposition of an additional liability of RM675m (paras 46–51);

G (d) payment of a RM74m 'gift' in 2009 to Sinohydro Corporation (M) Sdn Bhd wholly owned subsidiary of Sime's JV partner for the Bakun Project, coupled with a failure to procure a parental guarantee from Sinohydro and a gifting of plants to Sinohydro in 2009 (paras 52–61 and 66–74);

H (e) wrongful payment of RM16.5m to a design consultant called NIDRI in January 2008 (paras 61–65);

(f) breach of MCHJV's standard operating procedure in issuing variation orders in 2009, and loss caused thereby (paras 75–76); and

I (g) restitution of monies amounting to RM821,313.49 paid under an indemnity agreement to Shukri.

[21] The first and second defendants essentially seek an indemnity or contribution from all third parties in case they are found liable to the plaintiffs.

The crux of their respective claims can be found at para 71 of first defendant's statement of claim and para 19 of the second defendant's statement of claim. In brief the first defendant, Zubair, contends that all the third parties are 'inextricably involved' with the decision making process in the Sime Darby group whilst the second defendant, Shukri, states that such third parties 'collectively and/or severally breached their collective and/or individual duties' and should likewise be liable with them.

[22] The first and second defendants in the above two suits have taken out third party notices against various third parties seeking:

(a) an indemnity; and/or

(b) a contribution against the plaintiffs' claim.

[23] Following the third party notices taken out the first and second defendants have served their statements of claim on the third parties on or about 13 July 2011. The court pursuant to a case management direction had on 9 September 2011 allowed the filing of the third parties defence to be stayed pending the disposal of the third parties applications below.

PRAYER

[24] The third parties through their various solicitors have applied through various summonses in chambers to strike out the third party notices and the third parties claim pursuant to O 18 r 19(1)(a), (b), (c) and/or (d) of the Rules of the High Court 1980 ('RHC') on the grounds that:

(a) they do not disclose any reasonable cause of action; and/or

(b) they scandalous, frivolous or vexatious; and/or

(c) they may prejudice, embarrass or delay the fair trial of the Main Action and that between the 1st and 2nd Defendants and the Third Parties; and/or

(d) they are otherwise an abuse of the process of the Court.

[25] The arguments raised by counsel for the first defendant and counsel for the second defendant overlapped much with each other and shall be referred to collectively as the arguments of the counsel for the first and second defendants. Likewise to avoid prolixity, the arguments of the many and different counsel for the various third parties shall be referred to collectively as the arguments of

A the counsel for the third parties.

PRINCIPLES

B **[26]** Order 16 r 1(1) of the RHC 1980 provides that a third party notice may be issued by a defendant in the following circumstances:

(a) where the defendant claims against such a person not already party to the action any contribution or indemnity; or

C (b) where the defendant claims against such a person any relief or remedy relating to or connected with the original subject matter of the action and substantially the same relief or remedy claimed by the plaintiff; or

(c) requires that any question or issue relating to or connected with the original subject matter of the action should be determined not only as between the plaintiff and the defendant but also as between either or both of them and a person not already a party to the action.

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[27] The rationale for O 16 r 1(1) is not difficult to find. It is a broad provision that has been given a liberal interpretation as can be seen in the dicta E of His Lordship Raja Azlan Shah J (as His Royal Highness then was) in the case of *Federal Flour Mills Ltd v Owners of The Vessel 'Ta Tung' & Anor* [1970] 2 MLJ 147, in which His Lordship quoted with approval the following passage from the judgment of Lord Esher MR in the case of *Byrne v Brown* (1889) 22 QBD 657:

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> … to secure that, wherever a court can see in the transaction brought before it that the rights of one of the parties will or may be so affected that under the forms of law other actions may be brought in respect of that transaction, the court shall have power to bring all the parties before it, and determine the rights of all in one G proceeding. It is not necessary that the evidence in the issues raised by the new parties being brought in should be exactly the same; it is sufficient if the main evidence and the main inquiry, will be the same, and the court then has the power to bring in the new parties, and to adjudicate in one proceeding upon the rights of all the parties before it. Another great object was to diminish the cost of litigation.

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[28] Another pertinent observation is that of the Privy Council in *Pegang Mining Co Ltd v Choong Sam & Ors* [1969] 2 MLJ 52, where it was held that the party to be added must be one 'who ought to have been joined, or whose presence before the court may be necessary to adjudicate upon and settle all the I questions involved in the cause or matter'.

[29] I bear in mind that it is not necesssary that a third party claim must have crystalised before a third party action can be brought as was stated in *Pacific Asia Leasing (M) Bhd v Senanti Motors Sdn Bhd & Anor (YM Tunku Kamil*

Ikram, third party) [1992] 2 MLJ 364; [1992] 3 CLJ 1621, where Mahadev Shankar J (as His Lordship then was) observed:

> The terms of O 16 r 1(1)(a) in so many words apply to a defendant who 'claims … any contribution.' I do not read these words as importing a precondition that the defendant must establish that his cause of action for a contribution should already have accrued at the time he takes out his third party notice. The second defendant here was claiming a contribution in the event that the court found him liable to make any payment to the plaintiff. The potential cause of action he had against the third party would have crystallised at that point and the mutual obligations of the parties should be resolved immediately at the stage.

[30] However for the purpose of bringing in the third parties, the first and second defendants herein have chosen the first limb with respect to seeking to claim an indemnity or contribution from the third parties. Indeed the form used for the third party proceeding is with respect to claiming for an indemnity or contribution. Different forms are provided under O 16 r 1 to cater for these three distinct grounds for third party proceedings. Form 22 is the form of the third party notice to be issued if a defendant is claiming a contribution or indemnity (O 16 r 1(1)(a)), or a relief or remedy from the third parties relating to the subject matter of the plaintiff's action (O 16 r 1(1)(b)). These two distinct grounds are disjunctively stated in Form 22, and a defendant would have to include both in his third party notice if he intends to claim against the third parties under both O 16 r 1(1)(a) and (b).

[31] Form 23 is the form of the third party notice to be issued where the defendant requires a common question or issue to be determined at trial between all or any of the parties under O 16 r 1(1)(c).

[32] The first and second defendants' third party notices were issued in Form 22 and are expressly for an indemnity and/or contribution (under O 16 r 1(1)(a)) only.

[33] The first and second defendants' third party notices did not include either a claim under O 16 r 1(1)(b) or (c). That being the case, the first and second defendants cannot now in their submission expand it to cover the other limbs of seeking a relief or remedy relating to or connected with the original subject matter of the action and substantially the same relief or remedy claimed by the plaintiff; or that which requires that any question or issue relating to or connected with the original subject matter of the action should be determined not only as between the plaintiffs and the first and second defendants but also as between either or both of them and the third parties.

[34] I thus agree with the submission of the third parties that the first and

second defendants must be confined to satisfying this court that they have a right to claim an indemnity or contribution from the third parties.

The first and second defendants' claim to an indemnity

[35] As stated in the Supreme Court Practice 1976, Vol 1 at para 6/1/3 at p 226, it is trite that:

> A right to an indemnity may arise
>
> from express contract;
>
> from some statute …; or
>
> implied from some principles of law.

[36] As was stated by Lord Wrenbury in *Eastern Shipping Co v Quah Beng Kee* [1924] AC 177 at p 182 in the Privy Council:

> A right to indemnity generally arises from *contract* express or implied, but it is not confined to cases of contract. A right to indemnity exists where the relation between the parties is such that either in *law or in equity* there is an obligation upon one party to indemnify the other. (Emphasis added.)

[37] The abovementioned principle was expressly adopted by the High Court in *Syarikat Prema v Tastax Raya Sdn Bhd* [2003] 6 CLJ 60. More recently His Lordship Sulaiman Daud JCA in *BPI International Finance Ltd (formerly known as Ayala Finance (HK) Ltd) v Tengku Abdullah Ibni Sultan Abu Bakar* [2009] 4 MLJ 821 at p 830 said as follows:

> In our view, where a person A is claiming to be indemnified by B in respect of his liability to C, he must plead with clarity the basis of his entitlement to such an indemnity, ie whether it arises from any breach of contract, express or implied, or from any breach of duty of care, or otherwise to be implied from the nature of their relationship.

[38] See also *Sri Kelangkota-Rakan Engineering Sdn Bhd & Ors v Arab-Malaysian Prima Realty Sdn Bhd* [2001] 1 MLJ 324 at p 352; [2001] 1 CLJ 779 at p 812.

No indemnity under contract

[39] In so far as regards a claim for indemniy based on contract, there is simply no contract for any indemnity between the third parties or any of them, and the first and second defendants. With respect to the 12th and 13th third parties and the second defendant on the indemnity given, that shall be

discussed at the end of the judgment as it does not concern the general discussion involving the rest of the third parties at this stage.

[40] Otherwise neither is it pleaded nor alleged that there is any contract of indemnity between the first and second defendants and the third parties or any of them.

No statutory obligation to indemnity

[41] The third parties submitted through their respective counsel that there is no statutory obligation on the third parties or any of them to indemnify the first and second defendants either as claimed or at all. The first and second defendants have not suggested otherwise.

No obligation to indemnify either in law or equity

[42] There are certain recognised relationships that by law or in equity, may give rise to a right to an indemnity.

[43] As illustrated in *Pinsler on Civil Practice in Singapore and Malaysia*, Vol 2, Chapter XIII at para 43, an obligation to indemnify in law or equity may arise in the following circumstances:

> An agent may have the right of an indemnity against his principal in respect of his actions within the scope of his authority. A trustee may be entitled to an indemnity in respect of a breach of trust. A co-guarantor might be entitled to be indemnified by another co-guarantor.

[44] *Halsbury's Laws of England*, (5th Ed), Vol 49, para 1260 at p 595 lists the following in regard to indemnities as incidents of legal relationships:

> A right of indemnity is an incident of certain legal relationships, for example those of agency or employer and employee, where an agent or employee is liable to be indemnified by his principal or employer against liabilities incurred in the reasonable performance of his agency or employment. Rights of indemnity may also arise under principles of equity. In case of breach of trust a trustee may be indemnified out of the interest of a beneficiary who has instigated the breach or be entitled to contribution or indemnity from a co-trustee. A personal representative is entitled to be indemnified out of the estate for his proper expenses. A receiver is ordinarily entitled to be indemnified out of the assets against liabilities properly incurred by him. A director of a company regulated by the Companies Act 1985 is entitled to be indemnified by the company for all debts, expenses and liabilities incurred in the ordinary course of business, and for money borrowed and applied for those purposes.

A The trustees or committee of a club are not in general entitled to be indemnified by the members against liabilities incurred on behalf of the club.

B **[45]** I agree with learned counsel for the third parties that none of the relationships recognised either in law or in equity that can give rise to a right to an indemnity, or an obligation to indemnify, exists or existed between the third parties or any of them, and the first and second defendants. I would associate myself with His Lordship Dr Hamid Sultan J in the proposition of law laid down in *Multi-Code Electronics Industries (M) Bhd and another v Gordon Toh Chun Toh and Others* [2011] 1 LNS 896 that as between co-directors, a director C owes no duty to his fellow director. The context for the proposition of law laid down was not dissimilar to the present case. There the second defendant, a director of the first plaintiff, had sought leave to issue a third party notice for indemnity and contribution against the seven directors of the first plaintiff at the material time on, inter alia, the following grounds:

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(a) that the proposed third parties individually or collectively, as members of the Board of Directors of the first plaintiff have breached their fiduciary duties to the first plaintiff;

E (b) that the proposed third parties carried out the management of the plaintiffs' business without regard to proper procedure and internal controls; and

(c) that the proposed third parties acted contrary to the best interest of the plaintiffs.

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[46] In dismissing the second defendant's third party notice application, His Lordship propounded as follows:

> There is much merit in the plaintiffs' submission, inter alia, that *a director owes no* G *duty to his fellow director. His duties are owed to the company.* The duties of a director are set out in s 132 of the Companies Act 1965 which reflects the common law position as well. Even if those allegations of breaches of duties are true, it is for the company to exact those obligations from its directors. If there has been a breach, it is for the plaintiffs to sue and not the second defendant. The second defendant cannot bring these third party proceedings which is in effect a cloaked application H under s 181A of the Companies Act 1965. There is no law that permits the 2nd defendant to initiate legal proceedings for and on behalf of the plaintiffs in respect of the breaches of fiduciary duties of their directors under the Companies Act 1965 except for the plaintiffs themselves … (Emphasis added.)

I

[47] The first and second defendants have contended that a right of indemnity may arise by implication of law and this is exemplified in para 7 of the first defendant's affidavit in reply where the first defendant asserted as follows:

> In particular, *a right of indemnity may arise by implication of law where an act is done by one at the request of another in consequence of which the person doing it suffers loss.* I state that even if there is no express provision for indemnity, this Honourable Court is not precluded from ordering the 6th, 7th, 8th, 10th and 12th Third Parties to indemnify me on the basis of an obligation *in equity/or principles of natural justice* based on my relationship with the said Third Parties as co-directors whilst in the employ of the Plaintiffs. (Emphasis added.)

[48] I agree with the third parties' counsel that the above statement is a distortion of the factual matrix in this case. The first and second defendants were never 'requested to act' by the third parties or any of them as such, but if at all, it was by the Board of Directors of the plaintiffs. The first defendant and second defendants were never 'requested' or instructed to perform or commit any of the wrongs alleged by the plaintiffs in the main action. If indeed the first defendant and second defendants were so instructed, it would be a matter of defence for them to the plaintiffs' claim against them and not to be confused with an issue of indemnity from the third parties.

[49] It was also submitted that the first and second defendants' rights to be indemnified by the third parties stems from the fact that the decisions and actions pertaining to the Qatar and Bakun Projects that the plaintiffs have now challenged were taken on the instructions of the third parties, inter alia, via Board resolutions. Learned counsel for the first and second defendants continued further that it is well settled that where an act is done by one at the request of another and if in consequence of such act the person doing it suffers loss, the person sufferin g such loss would be entitled to be indemnified against such loss by the person who made the request in the first place. *Birmingham and District Land Co ltd v London and North Western Rly Co* (1886) 34 Ch D 261 was cited as an authority for such a proposition. However it is a suave glossing over and a gross over-simplification to equate the actions of the boards on behalf of the plaintiffs to be that of the rest of the Directors of the Boards and Committees of the plaintiffs from which the defendants can now seek an indemnity from each one of the remaining Board or Committee members.

[50] It was contended on behalf of the first and second defendants that it is evident from the reporting structure of the plaintiffs and its predecessors that the supreme decision-making body in all cases was the relevant Boards of Directors. The Boards authorised, ratified or recommended the now impugned decisions and acts that are presently being attributed solely to the first and second defendants. It was also submitted that those decisions and actions were approved or recommended by the third parties who sat on the various Board Committees.

[51] If that be so, then there is nothing that the first and second defendants

need to fear. If they were merely obeying orders, executing decisions and implementing instructions of the various Boards of the plaintiffs and reporting to them the status and stalemate at every cross-roads and crisis, then they can rest on it as their complete defence. They can call as witnesses the various third parties that they sought to join as third parties. That is not to be confused with the assertion now being advanced by the first and second defendants that they are entitled for a full indemnity by the other Board members who are non-executive.

[52] The relevant principle in question is captured and expressed concisely by Lord Scarman in the Privy Council in *Yeung Kai Yung v Hong Kong And Shanghai Banking Corpn* [1981] AC 787 relying on the earlier decision in *Sheffield Corp v Barclay* [1905] AC 392 and quoting thereform in the following terms:

> Indemnity
>
> The general principle was established by the House of Lords in *Sheffield Corporation v Barclay* [1905] AC 392, the facts of which, save in one respect (which the brokers submit is crucial), bear a close resemblance to the present case. The Earl of Halsbury LC laid down the principle in these words, at p 397:
>
> > In *Dugdale v Lovering* (1875) LR 10 CP 196 Mr Cave, arguing for the plaintiff, put the position thus: 'It is a general principle of law when an act is not in itself manifestly tortuous to the knowledge of the person doing it, and such act turns out to be injurious to the rights of a third party, the person doing it is entitled to an indemnity from him who requested that it should be done.' This though only the argument of counsel was adopted and acted upon by the court, and I believe it accurately expresses the law.

[53] The projects in issue in the main action are certainly not 'manifestly tortuous' and indeed this is not even the pleaded case in the first and second defendants' defence in the main action. Furthermore none of the third parties have been alleged of or accused of requiring the first and second defendants, expressly or by implication, to commit any of the wrongs alleged of them by the plaintiffs in the main action.

[54] The contention of the first and second defendants that the right to indemnity arises from some principles of natural justice is also misconceived and not supported by authorities.

[55] In light of the foregoing and based on the pleadings, there is no plausible case made out for any indemnity either as alleged by the first and second defendants or otherwise.

THE FIRST AND SECOND DEFENDANTS' CLAIM FOR CONTRIBUTION

Right to a contribution

[56] The first and second defendants claimed from the third parties for proportionate contributions towards the satisfaction of any damages that this court may make in favour of the plaintiffs.

[57] The right to contribution exists in situations which give rise to joint liability. For instance, in the case of *Hay v Carter* [1935] Ch 397, a surety who faced a claim on a guarantee could claim a contribution towards settlement of such claim against a co-surety.

[58] As rightly pointed out by learned counsel for the third parties, a right to contribution between joint tortfeasors does not exist in common law. That right is entirely a creature of statute. As stated by the learned authors in *Clerk & Lindsell on Torts*, (19th Ed), Chapter 4, paras 4–12 at pp 241–242:

> At common law the general rule for both joint tortfeasors, and several tortfeasors causing the same damage was that there could be no award of contribution or indemnity between them in the absence of an express or implied agreement which was not itself void on the basis of being contrary to public policy. Contribution between tortfeasors was introduced by s.6(1)(c) of the Law Reform (Married Women and Joint Tortfeasors) Act 1935.

[59] In Malaysia, a right to contribution is provided by s 10(1) of the Civil Law Act 1956 which provides as follows:

> (1) Where damage is suffered by any person as a result of a tort (whether a crime or not) …
>
> (c) *any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued have been, liable in respect of the same damage,* whether as a joint tortfeasor or otherwise, so, however, that no person shall be entitled to recover contribution under this section from any person entitled to be indemnified by him in respect of the liability in respect of which the contribution is sought. (Emphasis added.)

[60] I agree with the third parties' submission that the section abovementioned is in fact identifiably based on s 6(1) of the Law Reform (Married Women and Joint Tortfeasors) Act 1935 ('the 1935 Act') in the United Kingdom ('UK'). Our Supreme Court in *Mat Abu bin Man v Medical Superintendent, General Hospital, Taiping, Perak & Ors* [1989] 1 MLJ 226 at

p 227; [1989] 1 CLJ 137 at p 138 observed through His Lordship Hashim Yeop Sani Acting CJ (Malaya) (as he then was) that s 10(1)(c) of our Civil Law Act 1956:

> … is more or less a direct copy of s 6(1)(c) of the Law Reform (Married Woman and Tortfeasors) Act 1935 of the United Kingdom.

[61] The third parties through their learned counsel have submitted with much discernment that unlike the position in UK, we have not in Malaysia extended the ambit of s 10(1)(c) of the Civil Law Act 1956. In the UK the abovementioned section of the 1935 Act was repealed by s 1(1) of the Civil Liability (Contribution) Act 1978 to extend the right of contribution against '…any other person liable in respect of the same damage (whether jointly with him or otherwise).' The amendment has the effect of extending the right to contribution beyond mere joint tortfeasors.

[62] The history behind the UK Civil Liability (Contribution) Act 1978 is captured in the dicta of Lord Bingham in the House of Lords case of *Royal Brompton Hospital NHS Trust v Hammond and others (Taylor Woodrow Construction (Holdings) Ltd, Pt 20 defendant)* [2002] 2 All ER 801 at p 805 where His Lordship recounted thus:

> The Law Revision Committee's Third Interim Report and s 6(1)(c) of the 1935 Act were directed only to the liability, as between each other, of those who had committed tortious acts, whether jointly or concurrently. This limited field of application came in time to be recognised as a weakness, for s 6(1)(c) did not apply to wrongdoers other than tortfeasors and did not apply if only one of the wrongdoers was a tortfeasor. This was one of the weaknesses addressed by the Law Commission in its Law of Contract: Report on Contribution (Law Com No 79) published in March 1977. A number of recommendations were made with the main aim of widening the jurisdiction given to the courts by the 1935 Act (see p 23 (para 81)) and specific recommendations were made:
>
> (a) … that statutory rights of contribution should not be confined, as at present, to cases where damage is suffered as a result of a tort, but should cover cases where it is suffered as a result of tort, breach of contract, breach of trust or other breach of duty … (d)… that the statutory right to recover contribution should be available to any person liable in respect of the damage, not just persons liable in tort …

[63] Section 1(1) of the Civil Liability (Contribution) Act 1978 provides:

> Subject to the following provisions of this section, *any person lliable in respect of any damage suffered by another person may recover contribution* from any other person liable in respect of the same damage (whether jointly with him or otherwise). (Emphasis added.)

[64] Section 6(1) further supplements s 1(1) in providing as follows:

> A person is liable in respect of any damage for the purposes of this Act if the person who suffered it … is entitled to recover compensation from him in respect of that damage (whatever the legal basis of his liability, whether tort, breach of contract, breach of trust or otherwise).

[65] Lord Bingham further explained the effect of the Civil Liability (Contribution) Act 1978 as follows at p 805:

> It is plain beyond argument that one important object of the 1978 Act was to widen the classes of person between whom claims for contribution would lie and to enlarge the hitherto restricted category of causes of action capable of giving rise to such a claim. It is, however, as I understand, a constant theme of the law of contribution from the beginning that B's claim to share with others his liability to A rests upon the fact that they (whether equally with B or not) are subject to a common liability to A …

[66] His Lordship continued at p 806:

> … B's right to contribution by C depends on the damage, loss or harm for which B is liable to A corresponding (even if in part only) with the damage, loss or harm for which C is liable to A. This seems to me to accord with the underlying equity of the situation: it is obviously fair that C contributes to B a fair share of what both B and C owe in law to A, but *obviously unfair that C should contribute to B any share of what B may owe in law to A but C does not.* (Emphasis added.)

[67] Under the Malaysian position the first and second defendants would only be entitled to a contribution if the third parties or any of them are in law, joint tortfeasors with the first and second defendants.

[68] One cannot deny that the duties of non-executive directors are different from that of executive directors. What is expected of and exacted from them as non-executive directors are different from that of executive directors. Whilst they all owe a common duty to the company to act in good faith in the best interest of the company at all times (s 132(1) of the Companies Act 1965), yet with respect to the execution of the matters that the Board and Committee members have discussed, deliberated and decided, it is the executive directors that would execute the decisions made. In other words the executive directors will have to descend to the base and execute the decisions, solve problems, manage resources, monitor progress, measure performance and be answerable to the Board and Committee for the performance of the company as a whole. The executive directors being full-time employees of the company as most of them generally are, would be the hands-on people involved in the daily grind of negotiation, supervision and operations. The executive directors would be

answerable to the Board and Committee as a whole for the quarterly performance of the company as the non-executive directors meet with the executive directors in the full board meetings to review quarterly results before these are released to investors through Bursa Malaysia. Little wonder that the full board is required to meet at least four times in a year. The duties of the non-executive director vis-a-vis the company are performed on an intermittent basis as he meets with the other non-executive directors and executive directors at the quarterly meeting of the Board or more often as may be necessary. Whilst they receive director's fees for being non-executive directors, they do not draw a salary unlike executive directors who are expected to work in a normal 9–5 job.

[69] Non-executive directors are not full-time emplyees of the company and they may not be trained or experienced in the particular business of the company. They are allowed to be directors of other companies whether listed or non-listed subject to the number set by the bursa securities listing requirement. It stands to reason and indeed the reality of the mattter is that vis-a-vis the company, the non-executive directors' duties cannot be as co-extensive as that of executive directors. Both common sense and commercial structures draw a distinction that modern business cannot ignore.

[70] In fact way back in 1925 in the oft-quoted case of in *Re City Equitable Fire Insurance Company, Limited* [1925] 1 Ch 407 at p 429, it was propounded by Romer J as follows with respect to the duties of the other directors when sued for negligence by the liquidator in a case where the managing director through his deliberate fraud had caused a severe shortage in the funds of an insurance company of 1,200,000:

> (2) A director is not bound to give continuous attention to the affairs of his company. His duties are of an intermittent nature to be performed at periodic board meetings, and at meetings of any committee of the board upon which he happens to be placed. He is not, however to attend all such meetings, though he ought to attend whenever, in the circumstances, he is reasonably able to do so. (3) In respect of all duties that, having regard to the exigencies of business, and the articles of association, may properly be left to some other official, a director is, in the absence of grounds for suspicion, justified in trusting that official to perform such duties honestly.

[71] Fast forward to 1992, we have the case of *AWA Ltd v Daniels trading as Deloitte Haskins & Sells and others* (1992) 7 ACSR 759 where the different roles and responsibilities of the non-executive directors vis-a-vis the executive directors are expressed thus at p 867:

> Another division of function is between the non-executive directors and the chief executive officer or managing director. Generally a chief executive is a director to whom the board of directors had delegated its powers of management of the

corporation's business. Usually the chief executive is employed under a contract of service which will either include an express term or, in the absence of an express term, an implied term, that the chief executive will exercise the care and skill to be expected of a person in that position. The degree of skill required of an executive director is measured objectively. In contrast to the managing director, non-executive directors are not bound to give continuous attention to the affairs of the corporation. Their duties are of an intermittent nature to be performed at periodic board meetings, and at meetings of any committee of the board upon which the director happens to be placed …

[72] The above dicta capture the essence of the expectations of the role and responsibility of a director acting in a non-executive capacity.

[73] Thus when these non-executive directors are sought to be brought in as third parties one must ask the question as to whether the acts complained of are those that are predominantly and peculiarly that expected of and exacted from executive directors or are they acts attributed or attributable to non-executive directors. As what is claimed are actions arising out of the execution, implementation, supervision and operation of the projects; these are matters within the prime and pure purview and powers of the executive directors. To rope in the other non-executive directors by way of a third party proceeding when the company has no intention of pleading and pursuing against them in the pleading before us as formulated on a breach of fiduciary duties and negligence of the executive directors, would be to blur the distinction to the detriment of the other Board members and the company as a whole. Every Board would be reluctant to pass a resolution to claim against any of its executive directors in the name of the company as every other director including the non-executive ones may be roped in and be made responsible in every way as the executive directors through the doctrine of collective responsibility with its concept of a right to contribution from all the other directors.

[74] The duties of a non-executive director are not co-extensive with the duties of an executive director vis-a-vis the company on whose Board they sit. Neither are the acts which the plaintiffs alleged against the first and second defendants, acts which the first and second defendants have alleged against the third parties. All that the first and second defendants are saying in their statement of claim against the third parties are that the third parties are aware of and have approved of all the actions of the first and second defendants. If that be the case than it appears to be a complete defence for the first and second defendants and bringing in the third parties would be unnecessary.

[75] Judith Prakash J was confronted such a situation in the Singapore High Court case of *Nganthavee Teriya @ Gan Hui Poo v Ang Yee Lim Lawrence and*

others [2003] 2 SLR 361. The plaintiff and BC Tan, her husband were shareholders and directors of two Singapore companies, Europa and Erasmia. They commenced separate proceedings against the three defendants who were also shareholders and directors of the two companies. These defendants had bought over the plaintiff's and BC Tan's shares in the companies. The plaintiff brought an action against the defendants claiming that the defendants had committed fraud in misrepresenting certain facts to the plaintiff and BC Tan leading to them not taking up certain rights issue shares and later selling their shares at an undervalue. The plaintiff claimed against all three defendants, damages for misrepresentation and/or breach of an oral agreement and/or breach of fiduciary duties and/or conspiracy. The first and second defendants issued a third party notice seeking an indemnity or contribution from BC Tan in the plaintiff's suit. BC Tan applied to strike out the third party notice on the ground that it disclosed no reasonable cause of action.

[76] The first and second defendants' statement of claim in the third party proceedings were struck out, and amendments were not allowed. The claimants appealed against the decision.

[77] Her Ladyship's analysis in dismissing the appeal is worth reproduction below at pp 370–371:

> 22 In para 70 of the proposed third party statement of claim, the claimants averred that BC Tan was the person who represented to the plaintiff that the claimants had made the representations in respect of the rights issue (though they denied that they had in fact made those representations). Further, by para 71, the claimants averred that BC Tan was the person who persuaded and/or induced the plaintiff to consent to the rights issue. By para 72, they pleaded that in the event the court found that some or all of the rights issue representations were made by the first claimant and/or the second claimant, then they averred that BC Tan had aggravated and/or embellished these representations so as to persuade the plaintiff to consent to the rights issue. By para 73, the claimants averred that by reason of the matters pleaded in paras 70, 71 and 72, BC Tan was a joint and/or concurrent tortfeasor and claimed that he indemnify them against the plaintiff's claim and for judgment for any amount that may be found due from them to the plaintiff or for the amount of such contribution.
>
> 23 Ms Teh, counsel for BC Tan, submitted that the substance of the defence filed by the claimants to the plaintiff's claim was that they had not made the alleged representations in relation to the rights issue. In their statement of claim against BC Tan, however, their claim was based both on their denial that they had made the rights issue representations and their allegation that the plaintiff had been induced or persuaded by BC Tan to approve the rights issue. Counsel submitted that *if the claimants succeeded in their defence that they had not made these representations to BC Tan (who was the plaintiff's agent), the plaintiff's claim against them on the*

representations would fail and there would not be any issue of indemnity or contribution between them and BC Tan. If, on the other hand, they failed in this defence, which would mean that the court found that they had made those representations upon which the plaintiff acted, then whether the plaintiff was induced or persuaded by BC Tan to approve the rights issue could not give them a right of indemnity or contribution as the plaintiff's damage would result from representations made to BC Tan as the plaintiff's agent.

24 I accepted Ms Teh's argument. I also considered that in fact what the claimants were alleging was that BC Tan was a co-conspirator with them (assuming of course that they were to be found to have been engaged in a conspiracy to persuade the plaintiff not to take up the rights issue so that they would benefit from an increased entitlement to the new shares). I found such an allegation to be at odds with the probabilities of the situation. Why would the plaintiffs husband conspire with his co-directors to tell her untruths in order to persuade her to do something to her detriment when he himself knew it was to her detriment and also was intending to do the same thing himself ie not take up his entitlement under the rights issue? In any case, if he had been a co-conspirator, since it was admitted that he was her agent, she would not be able to succeed in her action against the claimants. Once this point was brought up as a point of defence and proved it would completely defeat the plaintiff's claim and there could be no issue between the claimants and the third party. As Ms Teh submitted, because BC Tan was the plaintiff's agent and alter ego in the matters relating to Europa, there was no separate issue to be tried whether of indemnity or contribution or otherwise between the claimants and BC Tan. Finally, as I stated in [18], in this situation I could not accept that any court would allow the claimants to obtain a contribution from BC Tan so as to lessen their liability to the plaintiff as such contribution would result in them retaining some of the benefit derived from their unlawful conduct. (Emphasis added.)

Whether the third parties are joint tortfeasors

[78] It was submitted quite persuasively that it is not alleged or pleaded in the first and second defendants' statement of claim that the third parties or any of them, jointly committed the alleged wrongful acts or omissions of which the first and second defendants are accused of in the main action. In fact, the plaintiffs' claims against the first and second defendants are premised upon their negligent conduct and/or their breach of trust and/or fiduciary duty owed to the plaintiffs as set out in pp 93–95 of the statement of claim in the Qatar Project suit for example.

[79] The crux of the plaintiffs' claims against the first and second defendants based upon the operational and /or implementation issues respecting the QP,

MOQ and Marine Projects. This is evident in but not limited to the following paragraphs of the plaintiffs' statement of claim: Paragraph 60:

> A pleaded in Paragraph 44 above, the total cost for the QP Project had escalated to RM1,664,000,846.00, that is, a mammoth cost overrun of RM796,120,86800. *The Plaintiffs contend that in directing, supervising, carrying out or implementing the QP Project, each of the Defendants acted incompetently, without any reasonable skill and in gross negligence.* (Emphasis added.) See: Plaintiffs' Statement of claim, paragraph 60 at page 38 Paragraph 108: *The Plaintiffs contend that the inexperience and lack of expertise of each of the Defendants in leading a project that they were not competent to be associated with, meant that insufficient planning and preparation for matters wholly foreseeable* resulted in delays as pleaded in Paragraph 107 above. The Plaintiffs contend that each of the Defendants are liable for negligently performing their tasks. (emphasis added.)
>
> See the plaintiffs' statement of claim, para 108 at p 57.

[80] The plaintiffs contended that from their statement of claim, particularly from the paragraphs above, it can be seen that the plaintiffs' claims against the first and second defendants primarily focussed on their supervision, operations and implementation of the QP, MOQ and Marine Projects. The third parties on the other hand had no such role or duty, and there is no allegation otherwise. The third parties were never employees of the plaintiffs. The third parties were at all material times non-executive directors of the plaintiffs with no executive duties or functions in respect of the said projects.

[81] The plaintiffs through their respective counsel were at pains to point out that for joint liability to arise between the third parties and the first and second defendants, the third parties must have procured the alleged tort as opposed to merely facilitating it. Support for this discernable distinction is found in the Court of Appeal's decision in *Credit Lyonnais Bank Nederland NV (now Generale Bank Nederland NV) v Export Credit Guarantee Department* [1998] 1 Lloyd's Rep 19 at p 35 where His Lordship Stuart-Smith LJ held:

> Be that as it may, it seems to me to be well established that a person who acts with another to commit a tort in furtherance of a common design will be liable as a joint tortfeasor. *It is not enough that he merely facilitates the commission of the tort unless his assistance is given in pursuance and furtherance of the common design.* (Emphasis added.)

[82] His Lordship went on to quote Scrutton LJ in *The Koursk* (1924) 18 Ll L Rep 153; [1924] P 140 at p 156 in the following terms:

> I am of the opinion that the definition in *Clerk and Lindsell on Torts*, (7th Ed), p 59, is much nearer the correct view: '*Persons are said to be joint tortfeasors when their respective shares in the commission of the tort are done in furtherance of a common*

design…' but mere similarity of design on the part of the independent actors, causing independent damage, is not enough; there must be concerted action to a common end. (Emphasis added.)

[83] As was carefully stated in *CBS Songs Ltd v Amstrad Consumer Electronics Plc* [1988] AC 1013 at p 1058, for joint liability to arise, the person in question must be directly involved, ie he must procure the tort as opposed to merely facilitating it. There must be the element of a positive act of participation in and procurement of the tort as in inciting and encouraging it. Mere knowledge that the tort has been committed or could be committed is not sufficient to rope the person in as a joint tortfeasor. See also the case of *PLG Research Ltd v Ardon International Ltd & Ors* [1993] FSR 197 at pp 238–239 where it was explained by Aldous J as follows:

> I believe it is clear that a director will not be liable unless his involvement would be such as to render him liable as a joint tortfeasor if the company had not existed. For example, the law distinguishes between facilitating and procuring a tort. A person who only facilitates a tort is not liable as a joint tortfeasor whereas a person who procures the tort is liable …
>
> What amounts to facilitating a tort will vary from case to case, but as Mellish LJ said in *Townshend v Hawarth* (1879) 48 LJ Ch 770 at p 773:
>
> > Selling materials for the purpose of infringing a patent to the man who is going to infringe it, even although the party who sells it knows that he is going to infringe it and indemnifies him, does not by itself make the person who so sells an infringer. He must be a party with the man who so infringes, and actually infringe.

[84] The third parties also pointed out that a claim for contribution is in effect a claim to a partial indemnity and it usually arises between joint debtors, joint tortfeasors and the like. I agree that the right to contribution depends on whether liability was co-ordinate, in the sense that liability is of the same nature and to the same extent. Parties must be in pari delicto and a party who is guilty of fraud, illegality, wilful misconduct or gross negligence is not entitled to contribution from his fellow directors when it has not been pleaded how they have been a participating party to the fraud, illegality, wilful misconduct or gross negligence.

[85] In *Burke & Anor v LFOT Pty Ltd* (2002) 1 CLR 282 the first appellant, B, was a director of the second appellant, *Hanave Pty Ltd* (Hanave). Hanave purchased a commercial property from the first respondent, LFOT. During the course of the sale of the property LFOT engaged in misleading and deceptive conduct in contravention of s 52 of the Trade Practices Act 1974 (Cth) (the Act). LFOT's conduct induced Hanave to purchase the property at an inflated price. B was Hanave's solicitor and he acted for Hanave in its purchase of the

property. In doing so he breached his duty of care to Hanave by failing to check the accuracy of the representations made by LFOT.

[86] The Federal Court assessed Hanave's loss under s 82 of the Act as $750,000, and it ordered LFOT to pay that sum to Hanave. The Federal Court also found that LFOT was entitled to a 50% contribution from B because B was also liable to Hanave.

[87] B appealed to the High Court and in allowing the appeal the High Court held, inter alia, at pp 292–293 that:

> [15] The doctrine of equitable contribution applies both at common law and in equity. It is usually expressed in terms requiring contribution between *parties who share 'co-ordinate liabilities' or a 'common obligation' Tio 'make good the one loss'.* More recently, in *BP Petroleum Development Ltd v Esso Petroleum Co Ltd* the right to contribution was said to depend on whether the liability was *'of the same nature and to the same extent'.*
>
> *The notion of 'co-ordinate liability' is one that depends on common interest and common burden.* Perhaps because, at common law, there was no general right of contribution between tortfeasors, the notion of 'co-ordinate liability' has not traditionally been expressed in terms requiring equal or comparable culpability or a requirement that the acts or omissions of the persons in question be of is equal or comparable causal significance to the loss in respect of which contribution is sought. However, *the requirement that liability be 'of the same nature and to the same extent', as stated in BP Petroleum, is apt to include notions of equal or comparable culpability and equal or comparable causal significance.*
>
> [17] *Culpability, as a facto bearing on the right to equitable contribution, clearly explains the requirement that for there to be a contribution between co-trustees, the co-trustees must be in pari delicto. So, too, it explains the rule that a person who has been guilty of fraud, illegality, willful misconduct or gross negligence is not entitled to contribution from his partners.* (Emphasis added.)

[88] The third parties submitted and with much substance that as mere non-executive directors the third parties never participated or were involved, either directly or indirectly, in the operational and/or implementation issues respecting the abovementioned projects as they had no managerial or executive functions. The duties of the non-executive directors cannot be co-ordinate and co-extensive with that of the executive directors where the company is concerned. Neither is it of the 'same nature and to the same extent'. Again it is not alleged by or pleaded in the first and second defendants' statement of claim that the third parties or any of them had jointly or were even involved in any of the wrongs alleged of the first and second defendants by the plaintiffs. Even if the third parties or any of them were aware of the alleged wrongs of the first and second defendants as alleged (which was denied), this mere knowledge does not by itself render the third parties or any of them joint tortfeasors with the first

and second defendants. The wrongs alleged of the first and second defendants rest resolutely on them and are not even remotely that of the third parties or any of them.

[89] It was contended on behalf of the first and second defendants that their alleged wrongful acts were approved by the plaintiffs' respective Board of Directors. If that is so then it would appear to be a sound defence for the first and second defendants and the matter would be resolved there. It cannot under the circumstances of the case give rise to a claim for a right to contribution between joint tortfeasors for to begin with, the third parties or any of them are not joint tortfeasors with the first and second defendants. Perhaps a better understanding may be had from a more familiar example of a road accident where A, a passenger in car driven by B sues C, an oncoming car that collided with B. Both C and B owe a duty of care which is co-extensive to A. Thus when A sues C for the injuries he suffers because of C's negligence, C may bring in B as a third party on the ground that C is entitled to a contribution from B depending on whether C is 100% liable or that B is contributorily negligent thus reducing the liability of C to A.

[90] The question is being asked: Why can't the defendant here bring in the Third Parties on an abundance of caution? If the defendant is not liable, the third party would not be liable as well. If the defendant is liable the defendant can look to the third party for a contribution. I think the answer lies in the fact that the duties of a defendant as non-executive director is not co-extensive with that of an executive director. In a road accident claim the defendant would be able to plead specific acts of negligence of the third party whereas here as the pleading stands there are no specific acts of a tortuous nature that have been pleaded against the third party non-executive directors. As stated before for the third party to be a joint tortfeasor with the defendant, there must be more than passive presence and participation in decision or even being kept posted on performance and profitability or otherwise of the projects and the problems encountered in its progress. There must be the element of active and purposeful procurement of the tort. It has not been so pleaded here.

[91] The other distinction is that whilst the duty of care in the road accident example is owing by both the defendant and the third party to the plaintiff as well as by the defendant and the third party to each other, here the duty of care is not owed by the defendant and third party to each other in the current proceedings. The third parties do not owe a duty of care to the first and second defendants; only to the plaintiffs. See *Multi-Code Electronics Industries (M) Bhd*'s case.

COLLECTIVE RESPONSIBILITY AND INDEMNITY

[92] The first and second defendants submitted that the third parties bear

collective and collegiate responsibility for the conception and implementation of the Qatar Project and the Bakun Project having been directors of the plaintiffs and/or their predecessors and/or members of the Board Committees of the plaintiffs or their predecessors. The doctrine of collective responsibility amongst directors was spelt out in the case of *Re Westmind Packing Services Ltd, Secretary of State for Trade & Industry v Griffiths & Ors* [1998] 2 BCLC 646 at p 653. The words of Lord Woolf MR in that case reverberate through boardrooms and the corridors of commerce:

> … the collegiate or collective responsibility of the Board of Directors is of fundamental importance to corporate governance under English company law … A proper degree of delegation and division of responsibility is of course permissible, and often necessary, but total abrogation of responsibility is not. A Board of Directors must not permit one individual to dominate them and use them, as Mr Griffiths plainly did in this case. Mr Davis commented that the appellants' contention (in their affidavits) that Mr Griffiths was the person who must carry the whole blame was itself a depressing failure, even then, to acknowledge the nature of a director's responsibility. There is a good deal of force in that point.

[93] Of course the above case was not one where there was a claim for a contribution or indemnity. It was one where the court was asked to decide on the test and the evidence that was admissible with respect to the length of disqualification of a director under the UK Company Directors Disqualification Act 1986.

[94] It was submitted with considerable appeal and attraction that the reporting structure of the plaintiffs requires nothing short of collective responsibility when things go wrong. The consequences, it was canvassed, should be carried by all the directors. The losses should not be lumped on the three or five directors as in the Qatar Project suit and the Bakun Project suit respectively but that liability should attach to all. It may be asked, why should just three or five directors be singled out to bear the brunt of the burden arising from the losses?

[95] From the defence filed by the first and second defendants, it was contended that the plaintiffs' Board had initially approved the Qatar Projects and the Bakun Projects and later affirmed the projects in their various stages of progress. It was stated in the defence that the plaintiffs' Board had been appraised of and appreciated the risks involved in the implementation of the projects. They thus argued that should the court find that they are liable then the other directors of the plaintiffs at the relevant time ought to be liable as well.

[96] To them, all directors owe the same duty of care, to exercise powers for a proper purpose and in good faith in the best interest of the companies they

represent. They further highlighted that the Companies Act 1965 makes no distinction between the duty of an executive director and that of a non-executive director.

[97] The first and second defendants are saying that based on the above they have made out a strong case that arising out of the relationship of the co-directors to one another and to the plaintiffs, there has arisen either in law or in equity an obligation upon the other directors, albeit non-executive to an indemnity.

[98] I think a distinction must be made between an action by a company against its directors or some of them for damages arising out of the directors' breach of fiduciary duties and/or negligence and one where an outsider or shareholder is claiming against the directors of the company. In the case of the former the company is at liberty to hold the directors accountable according to the duties and tasks assigned to them and generally that will emanate from whether they are performing an executive or a non-executive role. Whilst the Companies Act 1965 does not make a distinction between an executive and non-executive director in that the same duties are exacted of them under s 132 of the Act, yet where the nomenclature of the Listing Requirements of Bursa Malaysia and the Malaysian Code of Corporate Governance are concerned, one cannot ignore the distinction that is involved. The Malaysian Code of Corporate Governance (Revised 2007) published by the Securities Commission has this to say on the composition of the Board under Part I Principles of Corporate Governance:

> Board Balance
>
> The board should include a balance of executive directors and non- executive directors (including independent non-executives) such that no individual or small group of individuals can dominate the board's decision making.

[99] In fact the different roles expected of them are delinated in the Malaysian Code of Corporate Governance. In Part II of the Code on Best Practices in Corporate Governance it is spelt out as follows:

> Board Balance
>
> Non-executive directors should be persons of calibre, credibility and have the necessary skill and experience to bring an independent judgment to bear on the issues of strategy, performance and resources, including key appointments and standards of conduct. To be effective, independent non-executive directors should make up at least one-third of the board membership.

[100] With respect to the use of Board Committees like the Audit Committee the Code in Part II under Part BB Accountability and Audit states:

The audit committee

The board should establish an audit committee comprising at least three members, a majority of whom are independent. All members of the audit committee should be non-executive directors. The board should provide the audit committee with written terms of reference which deal clearly with its authority and duties. All members of the audit committee should be financially literate and at least one should be a member of an accounting association or body.

[101] The composition of Board members of a listed company for instance is addressed in the listing requirements of Bursa Malaysia with respect to at least one third of the Board consisting of independent non-executive directors with a set of criteria to be fulfilled before one can be said to be truly independent. Under the definition of 'Independent Director' in Chapter One of the listing requirements it is stated that he is one who is '(a) not an executive director of the Corporation'. It is also set out in (a)–(g) of the definition of 'Independent Director' the criteria that one must meet before one qualifies to be an independent director. In Chapter 15 at para 15.09(1)(b) it is required of all members of the Audit Committee to be 'non-executive directors, with a majority of them being independent directors.' of the failure of some of the executive directors in the discharge of their duties.

[102] A company under the control of a new major shareholder who together with other shareholders may garner enough support to pass a resolution to sue some or all of the previous Board members who have resigned or have been removed as directors for breach of fiduciary duties and negligence that had caused the company losses during their stewardship of the company. The directors sued can in their defence raise the claim that the losses are not fully attributable to them but that other directors of the company are also to be held liable and the court upon finding of facts reduce the amount that the directors who are being sued are liable after having considered the role of the other directors then constituting the Board. See the case of *AWA Ltd v Daniels trading as Deloitte Haskins & Sells and Others* (1992) 7 ACSR 759 and also *PlanAssure PAC (formerly known as Patrick Lee PAC) v Gaelic Inns Pte Ltd* [2007] 4 SLR 513 where when the auditors of the companies were sued, the courts reduce the damages recoverable to the extent of the contributory negligence of the companies arising out of the failure of some of the executive directors in the discharge of their duties.

[103] That is to be distinguished from the directors as defendants bringing in the other directors not being sued as third parties. It is for the plaintiff companies to decide who to sue from among its Board members whose action or inaction have caused losses to the company.

[104] To the world a director is a director, is a director. Thus in the latter case

where an outsider or shareholder is suing any or all of the directors of a company, it can do so accordingly and it is for the directors concerned to defend accordingly. The directors can say that they are just mere agents of the company they represent and that unless the corporate veil is lifted on account of fraud, they cannot be sued in their personal capacities as a company is a separate legal entity from its directors. however if the directors have been sued for breach of their statutory duties whether in the context of non-payment by the company of EPF contribution due on behalf of its employees or some other duties imposed on directors under the Companies Act 1965 for instance, then it is not open to the directors to advance the argument that they are only non-executive directors and so were not tasked with that particular duty or responsibility. To the world where the liability of directors are concerned, all the directors are one and the same for the Companies Act 1965 do not have the nomenclature of executive and non-executive directors.

[105] Thus in this case where the plaintiffs are suing some but not all of its directors for losses arising out of breach of fiduciary duties and negligence, it reserves the right and liberty to decide who amongst the directors should be held responsible with respect to the execution of what may well have been authorised and approved by the various Boards of the plaintiffs and its various Committees.

COLLECTIVE RESPONSIBILITY AND CONTRIBUTION

[106] Learned counsel for the first and second defendants cited the case of *Ashhurs v Mason; Ashhurst v Fowler* (1875) LR 20 Eq 225 for the proposition that a claim for contribution may lie against a fellow director for a wrong jointly committed against the company. I think it must be emphasised here that the proposition above is in the context of a 'wrong jointly committed against the company'. It is not suggested that the third parties here have jointly committed a wrong against the plaintiffs. There was nothing in the nature of a wrong committed against a company for the Board to have approved of the projects undertaken by the plaintiffs. *Ashhurs v Mason*'s case was one where the chairman of the English Assurance Company which had gone into liquidation had brought an action against the defendants, his co-directors, for the purpose of recovering contribution from the defendants in respect of calls already paid and to be paid for certain shares transferred into the joint names of the plaintiff and a manager of the company and accepted by them at the request of the defendants. At the Board meeting where the other directors were present, the manager suggested that it would not be right that the shares should stand solely in his name, and that the plaintiffs' name should be added. The plaintiff, according to his statement, at first objected, but upon the express arrangement that his co-directors should hold him harmless against all consequences — 'see him thorough it' — he agreed that the shares should be registered in the joint

names of himself (the plaintiff) and the manager. A resolution was accordingly passed that the shares should be transferred into the joint names in trust for the company. The transfer of the shares was ultra vires the articles of association of the company. In holding that the plaintiff was entitled to a contribution from the directors who concurred in the transaction, for calls which he had paid, Sir James Bacon VC said at pp 233–234:

> It would be out of all reason to suppose that either Leyland, who was merely the manager of the company, or Ashhurst, who happened to be chairman, should take upon themselves any risks or any consequences personally. It is not their invention, it is not their first suggestion, but it is a common design entertained by several persons, and the means of carrying out that design to its accomplishment is that the transfer should be made in these two names. Unless I could say that, in justice, Mr Ashhurst is bound to bear the whole of this burden, because he had imprudently permitted his name to be used, the next consequence must be that they who have procured his name to be used, who have adopted his name to carry into effect their design, must reasonably contribute to the loss, since the loss has happened. That rests upon universal principles. There can, I apprehend, be no doubt in this world about it.

[107] Surely in such a context, it cannot be allowed that the plaintiff be the only person who was under a legal liability to pay for the calls on the shares. The other directors having procured and resolved what turned out to be an ultra vires act cannot now wash their hands of the matter. The co-directors who were in a common design and having carved the direction the plaintiff should take, must now be held liable to a contribution. The facts are poles apart from our present case where there is nothing ultra vires about the execution of the Qatar or Bakun Projects.

[108] Another case cited as authority for the first and second defendants' claim to a contribution is that of *Shepheard v Bray* [1906] 2 Ch 235. This was a case where the directors of a company issued a prospectus on the faith of which one Mr Broome applied for and was allotted shares in the company. Broome brought an action under s 3 of the Directors Liability Act 1890 against three of the directors for compensation on the ground that the prospectus contained untrue statement. Judgment was given in his favour with costs and an inquiry into damages. The defendants appeal to the Court of Appeal and House of Lords was dismissed with costs. A compromise was arrived at where Broome was paid compensation by the directors sued. Many other shareholders made claim which were also compromised with the three directors as defendants paying out a hefty sum of monies as compensation.

[109] These three directors did not take out third party proceeding but instead brought a separate action against the remaining directors and the executors of three of them who had died since the prospectus was issued, to

enforce under s 5 of the Directors Liability Act 1890 contribution by them of their share of the compensation which had been paid. It must be pointed out that s 3 of the Directors Liability Act 1890 imposed personal liability on 'every person who is a director of the company at the time of the issue of the prospectus,' as being liable to 'pay compensation to all persons who shall subscribe for any shares … for the loss or damage they may have sustained by reason of any untrue statement in the prospectus unless certain things are proved'. It can thus be appreciated that there the statute imposed personal liability on all directors irrespective of whether they were discharging an executive or a non-executive role. More importantly s 5 of the same Act statutorily provided for a right of contribution as follows:

> Every person who by reason of his being a director, … or of his having authorized the issue of a prospectus or notice, has become liable to make payment under the provisions of this Act, shall be entitled to recover contribution, as in cases of contract, from any other person who, if sued separately.would have been liable to make the same payment.

[110] Having ascertained that the right to a contribution here is provided for statutorily, we have can appreciate the court's decision after having found the prospectus to contain untrue statement, as follows at p 235 of the headnotes:

> Held, further that if Broome had brought an action against all the directors, including those who were now dead, he would have succeeded; that the right to contribution, inasmuch as under the statute it arose as if from contractual relations between the parties, could be enforced against the estates of the deceased directors; and that the defendants must pay, with interest, their share of the compensation and the costs of Broome and other shareholders which had been paid …

[111] Here there was nothing suggested of a statutory right to a contribution arising out of the collective action of the other Board members/directors in approving the projects. The case of a contribution by the other directors of the company when a select few have been sued by a shareholder for losses arising from statements in a prospectus that have been found to be untrue as in the case of *Shepheard v Bray* can be distingushed from the present case where the executive directors of the plaintiffs have been sued by the plaintiffs for losses arising out of a breach of fiduciary duties and for negligence.

[112] The first and second defendants also cited the case of *Ramskill v Edwards* (1886) 31 Ch D 100 where the directors of a company had advanced monies of the company upon an unauthorised security and two sums totalling £1,000 lent in that manner was lost. The company obtained judgment against one of the directors, Mr X, who participated in granting the loan. Mr X then sought ot bring proceedings against three of his co-directors for contribution.

The court allowed Mr X's action and ordered damages against each of the co-directors in proportions commensurate to their involvement in granting the loan.

[113] Here again the facts can be distinguished from the present case as the act of granting a loan on an unauthorised security was an act assented to by all the directors and in a very real sense of the word, they were all joint-tortfeasors.

[114] Yet another case cited by the first and second defendants for the assertion that the participation of the third parties in the decision making process of the plaintiff which in turn led to the acts and/or omission now impugned by the plaintiff is sufficient to compel the third parties to contribute is the old case of *The Charitable Corporation v Sir Robert Sutton and others* (1742) 26 ER 642. it must be noted that this was a case where the plaintiff was a corporation that was a creation of a charter from the crown. The defendants, who were fifty in number, and were either Committee-men, or in other offices were sued for breach of trust, fraud and mismangement. It is pertinent to note the pleading against the Committee-men: '1st, that they have been guilty of manifest breaches of trust, or at least of such supine and gross negligence of their duty, and so often repeated, that it will amount to a breach of trust.' It was in this context that it was opined by the Lord Chancellor as follows at p 645:

> In the present case, one thing is clear, that Sir Archibald Grant, Robinson, Thompson, Burrows and Squire, who were the five that were engaged in that confederacy, are certainly liable to make good the losses which the corporation have sustained in the first place, and the committee-men who were not partners in this affair are liable in the second place only. Therefore, in the present case, I am of opinion, if there is no evidence to charge the committee-men of being privy to the original design, yet they will be guilty in the second degree, by conniving at the affair, and not making use of the proper power invested in them by the charter, in order to prevent the ill consequences arising from such a confederacy.

[115] Translated some 250 years later in the more developed regime of company law, it is no different where company sues all the directors and senior management team members for breach of trust, fraud and mismangement. Liability of different ones of them will be different based on their degree of involvement in the particularised acts complained of and whether their presence in the Board or Committee meetings in approving certain transactions would be participation in the fullest sense of the word in the execution and implementation of the projects. In such a situation the court would have to consider whether presence at Board or Committee level in passing resolutions without purposeful and positive action at the base or camp would attract the same liability. The case of *The Charitable Corporation* has nothing to do with a third party action.

[116] Would drawing a distinction between the duties and responsibilities of a non-executive director and an executive director, as the third parties have done, be not only contrary to the principles of good corporate governance, but also entail taking the definition of the word 'director' in the Companies Act 1965 beyond legislative intent, as was feared by counsel for the first and second defendants? This can be discerned from the case of *Ravichanthiran a/l Ganesan v Percetakan Wawasan Maju Sdn Bhd & Ors* [2008] 8 MLJ 450 where the High Court held the following:

> Even, assuming that the plaintiff is a non-executive director, nevertheless he is still a director in the eyes of the law and his roles and duties are governed by the CA in particular, s 132. Furthermore a non-executive director is entrusted to look after the affairs of the company and to keep a close watch on the company's managers and other directors in order to safeguard the investment of shareholders.

[117] The above dicta of His Lordship Ramly Ahmad J (as he then was) in the above case was said in the context of s 46 of the Employees Provident Fund Act 1991 which imposes a personal liability on all directors of a company that fails to pay monthly contributions for their employees to the EPF. Where Parliament has exacted personal liability on directors, it would be against the clear legislative intent to argue that non-executive directors are exempt from such a liability.

[118] The High Court in that case also made reference to the decision in *Lembaga Kemajuan Wang Simpanan Pekerja v Rubfil Sdn Bhd & Ors* [2005] 7 MLJ 175, where it was held that:

> The directors be they nominees, sleeping directors or non-active directors owe a duty to see the company's employees EPF protected. As directors of the company whether active, nominee, sleeping or non-active directors all of them are jointly and severally liable ….

[119] Section 46 of the Employees Provident Fund Act 1991 is clear where its is legislative intent is concerned:

> 46 Joint and several liability of directors, etc
>
> (1) Where any contributions remaining unpaid by a company, a firm or an association of persons, then, notwithstanding anything to the contrary in this Act or any other written law, the directors of such company including any persons who were directors of such company during such period in which contributions were liable to be paid, or the partners of such firm, including any persons who were partners of such firm during such period in which contributions were liable to be paid, or the office-bearers of such association of persons, including any persons who were office-bearers of such association during such period in which contributions were liable to

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> be paid, as the case may be, shall together with the company, firm or association of persons liable to pay the said contributions, be jointly and severally liable for the contributions due and payable to the Fund.

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[120] The distinction between an action one where the company is claiming against its directors or more commonly its previous directors and one brought by shareholders or even outsiders as well as the regulators against the directors is a valid one. In the former case, the company is at liberty to decide which directors to sue depending on their culpability in what they have done or failed to do. Generally the directors who have to bear the brunt and burden when the company suffer losses would be the executive directors who are charged with the responsibility of running the company. In the latter case, with respect to the world at large, the directors are all the same as the Companies Act 1965 does not differentiate between them with respect to whether they are executive or non-executive.

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[121] Thus, when the authorities and regulators bring an action against the directors, none of the non-executive directors can wriggle their way out of liability especially when the statute imposes personal liability on all. In that context I would agree that although a certain degree of delegation is permitted, the Board retains an overall duty of supervision and control. Jonathan Parker J in the case of, *Re Barings plc and others (No 5), Secretary of State for Trade and Industry v Baker and others (No 5)* [1999] 1 BCLC 433 captures the essence of personal liability of the directors of the company irrespective of their individual roles. The court in that case went on to hold that the exercise of the power of delegation did not absolve a director from the duty to supervise the discharge of the delegate functions. Again the context must be appreciated: it was a case brought by the Secretary of State for Trade and Industry under s 6 of the Company Directors Disqualification Act 1986 for the disqualification orders against three respondents who were directors of the Baring Group of companies. The court went on to observe too at p 436 of the headnotes as follows:

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> (f) Where there was an issue as to the extent of a director's duties and responsibilities in at any particular case, the level of reward which he was entitled to receive or which he might reasonably have expected to receive from the company might be a relevant fact in resolving that issue. It was not that the unfitness depended on how much he was paid. The point was that the higher the level of reward, the greater the responsibilities which might reasonably be expected (prima facie, at least) to go with it.

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[122] No one would argue against the general position that non-executive directors, bearing in mind their attendance only for periodic meetings of the company and generally their non-executive role, are paid much less compared to executive directors who have a full-time job assigned to them. Indeed

everyone to whom much is given, of him will much be required. The duties of non-executive directors and executive directors to the company cannot then be co-extensive. Both the reward element, the rigours and risks in the exercise of executive functions and powers and the reality of corporate governance structure dictate the difference that have come to distinguish one from the other.

[123] *The third party action brought by the second defendant in the Qatar suit against the 13th third party Sime Darby Holdings Bhd and against the 12th third party Sime Darby Engineering Sdn Bhd and the 13th third party who is also the third plaintiff in the Bakun suit.*

[124] It was submitted that the 13th third party in the Qatar Project suit had by virtue of the receipt, discharge and indemnity agreement dated 12 January 2010 ('indemnity agreement') entered into with the second defendant had fully, completely, conclusively and finally released and discharged the second defendant from all actions, suits, causes of action, claims and demands whatsoever nature within the jurisdiction that the 13th third party and/or group may have against the second defendant and to indemnify him of the same.

[125] It was contended that the 12th third party in the Bakun Project suit had by way of a power of attorney dated 11 August 2005 appointed the second defendant as its lawful attorney. The said appointment was expressed to be irrevocable as long as the second defendant shall remain a director of the second plaintiff to carry matters in respect of the Bakun Project.

[126] It was argued that the 12th third party in the Bakun Project suit had by a deed of revocation dated 31 March 2010 unconditionally undertook to indemnify the second defendant against all actions, proceeding, claims, cause, damages, demands, expenses and liabilities including legal costs on a full indemnity basis arising from the exercise by the second defendant of any powers conferred by the power of attorney.

[127] It was further submitted that in relation to the 13th third party in the Bakun suit, it had entered into the above indemnity agreement with the second defendant to fully indemnify the second defendant against all claims arising out of the Qatar and Bakun Projects.

[128] It was argued on behalf of the third plaintiff that the 13th third party is already the third plaintiff in the Bakun suit and hence under O 16 r 1(1)(a) of the RHC, a third party notice is to be issued where the 'defendant claims against a person not already a party to the action any contribution or indemnity.' Based on the authority of the Federal Court in *Chan Kit Hong &*

Anor v Jayakumar & Anor [1984] 2 MLJ 271 it was argued that the second defendant could file a counterclaim against the second and third plaintiffs instead of bringing them in as third parties.

[129] I do appreciate the second defendant's argument that a counterclaim for all intents and purposes is detached and/distinct from the main claim whereby a counterclaim can stand independent of the main suit. If a counterclaim cannot stand independent of the main suit then for all intents and purposes the same cannot be a counterclaim. Indeed O 16 r 8(1)(a) of the RHC envisages a situation where a defendant claims against a person who is already a party to the action any contribution or indemnity and O 16 r 8(2) specifically states that where that claim could be made by him by counterclaim in the action, then para (1) shall not apply in relation to the claim. In other words a third party notice does not apply in a case where the defendant can validly make a counterclaim. Order 16 r 8(1) and (2) of the RHC read as follows:

> (1) Where in any action a defendant who has entered an appearance —
>
> (a) claims against a person *who is already a party to the action* any contribution or indemnity; or
>
> (b) claims against such a person any relief or remedy relating to or connected with the original subject-matter of the action and substantially the same as some relief or remedy claimed by the plaintiff; or
>
> (c) requires that any question or issue relating to or connected with the original subject-matter of the action should be determined not only as between the plaintiff and himself but also as between either or both of them and some other person who is already a party to the action;
>
> then, subject to paragraph (2), the defendant may, without leave, issue and serve on that person a notice containing a statement of the nature and grounds of his claim or, as the case may be, of the question or issue required to be determined.
>
> (2) Where a defendant makes such a claim as is mentioned in paragraph (1) and *that claim could be made by him by counterclaim* in the action, *paragraph (1) shall not apply in relation to the claim.* (Emphasis added.)

[130] The converse then is true; where the defendant cannot make a counterclaim, he is perfectly entitled to bring a third party action even against one that is already a party to the action as in already a plaintiff. In *Amon v Bobbett* (1889) 22 QBD 543 at pp 547–548, it was held as follows:

> … in which the question was whether a plaintiff who was met by a counterclaim was at liberty by discontinuing his own claim to put an end to the counterclaim. Now if a counterclaim is to be treated as having no vitality except as a bar to the action, it becomes a defence and not a counterclaim; but, as was said in that case, it is more than a defence, it is in the nature of proceeding in a cross-action, and when necessary for the purposes of justice it must not be so treated. A counterclaim is therefore to be treated, for all purposes for which justice requires it to be treated, as an independent action, and it is necessary for justice to be done under O LXV, r 12, to consider it as not being part of the action, but as being disconnected from it …

[131] I agree that the second defendant's claim for indemnity and contribution against the 12th and 13th third party in the Bakun Project suit and against the 13th third party in the Qatar Project suit cannot be properly brought as a counterclaim as opposed to a third party proceeding. In other words the saecond defendant cannot maintain an independent action against the plaintiffs in the absence of an action taken by the plaintiffs against the second defendant. His claim for an indemnity would only arise if the plaintiffs have sued him.

[132] That aside, if the court hearing the matter between the plaintiffs and the second defendant in the main action should hold that the deed of revocation and indemnity are valid in law and binding, then the second defendant would have a complete defence and be entitled to a full indemnity even where costs incurred by him in successfully defending the suits is concerned. The second defendant may even apply to have the plaintiffs' actions against him struck out based on the deed of revocation and indemnity agreement as evidencing a complete resolution of all claims by the plaintiffs under a Mutual Separation Scheme if he is confident of his legal position.

[133] The said deed of revocation and indemnity agreement are said by the plaintiffs to be caught by s 140(1) of the Companies Act 1965. Section 140(1) provides as follows:

> Any provision, whether contained in the articles or in any contract with a company or otherwise, for exempting any officer or auditor of the company from, or indemnifying him against, any liability which by law would otherwise attach to him in respect of any negligence, default, breach of duty or breach of trust, of which he may be guilty in relation to the company, shall be void.

[134] However it is not necessary for there to be a third party action to determine that issue and question as the same would be decided in the main action as the plaintiffs have pleaded that the said indemnity is void under s 140(1)of the Companies Act 1965.

[135] In the light of the above it is wholly unnecessary for the second

defendant to have brought in the 13th third party in the Qatar Project suit and the 12th and 13th third parties in the Bakun Project suit.

THE TEST FOR STRIKING OUT UNDER O 18 R 19 OF THE RHC

[136] It was held in *Lee Kuan Yew v Devan Nair (Straits Times Press (1975) Ltd & Anor, third parties)* [1993] 1 SLR 723 that the principles applicable to an application to set aside a third party notice are the same as those governing the determination of an application to strike out a plaintiff's claim under O 18 r 19 or inherent jurisdiction of the court. The Supreme Court in *Bandar Builder Sdn Bhd & Ors v United Malayan Banking Corporation Bhd* [1993] 3 MLJ 36 held that striking out for no reasonable cause of action is only appropriate in cases which are plain and obvious so that a judge can say at once that a statement of claim as it stands is insufficient, even if proved, to entitle the plaintiff to the relief which he asks for. This principle was enunciated by His Lordship Mohamed Dzaiddin SCJ (as the former CJ then was) at p 40:

> The principles upon which the court acts in exercising its power under any of the four limbs of O 18 r 19(1) of the RHC are well settled. It is *only in plain and obvious cases* that recourse should be had to the summary process under this rule (per Lindley MR in *Hubbuck & Sons Ltd v Wikinson, Heywood & Clark Ltd*), and this summary procedure can only be adopted when it can be clearly seen that a claim or answer is on the face of it is *'obviously unsustainable'* (see *AG of Duchy of Lancaster v L & NW Rly Co*) (Emphasis added.)

[137] In as much as the court is ready to strike out pleadings that are obviously unsustainable, the court is equally restrained from doing so as long as the pleading disclosed some cause or action or raised some question fit to be decided by the judge; the mere fact that the case was weak and not likely to succeed at the trial was no ground for the pleadings to be struck out.

[138] Thus the court's power to strike out must be exercised sparingly and as long as the pleading discloses a claim or raises some question fit to be decided, the case should be set down for argument, as was held in the case of *Saripah bte Manap & Ors v Emar Sdn Bhd (in dissolution) & Ors* [1998] 1 MLJ 323.

[139] Where the point of law is unarguable, there is no need to go to trial and the claim can be struck out. In *Liu, Ren-Shuenn v Lee, Chiu-Pin* [1999] 2 CLJ 35, His Lordship Jeffrey Tan J (as he then was) held that in a striking out application, if the sole issue was one of sustainability of a pleading that was clear cut and which can be decided without a trial, the court can strike out the pleading. The sole issue being entirely one of law, it should be decided without the rigmarole of a full trial.

[140] In *Ng Kian Chong & Ors v Saw Seng Kee* [1994] 3 MLJ 691; [1994] 4 CLJ 857 it was held that the words 'frivolous and vexatious' relate to cases which are obviously unsustainable as would amount to an abuse of the court. It was further held that the classifications of conduct rendering a claim frivolous, vexatious or an abuse of process are not closed. Much will depend on all the relevant circumstances and, towards this end, the consideration of public policy and the interests of justice may be relevant and material.

[141] In the context of O 34 of the RHC with respect to pre-trial case management, His Lordship Dr Hamid Sultan J in *Amanah Scotts Properties (KL) Sdn Bhd & Ors v Ooit Meng Khin & Ors (No 2)* [2011] MLJU 441; [2011] 1 LNS 500 has taken a fresh approach in these words:

> (ii) … The obligation of the court is now much wider and in consequence, cases which had not taken into consideration O 34 must be read with caution and must not be taken to tie the hands of the court to even consider the merits at the leave stage if necessary,
>
> (iii) It is trite that the defendant has the burden to make out a prima facie case at the leave stage. I agree with the submission of the plaintiffs' that the first defendant has not made out a prima facie case, and in my view the first defendant has not even satisfied the threshold requirement for a case in contract or tort, as adumbrated by the plaintiffs. Further this is not a case where the main action and/or relief are inextricably linked and the third party action is an integral and inseparable part of the main action. This test may be appear to be rigid but a necessary criterion for courts to meticulously follow with view to arrest any form of abuse of process of court and/or procedural vagaries which may slow down the main action, and create a train of litigants and counsel which may create inconvenience to the administration of justice. *In my view O 16 being a procedural device was not created to exclude the overriding jurisdiction of the court to control its proceeding in just and equitable manner without prejudicing the rights of parties. The defendant is always at liberty to bring a separate action if the complaint is genuine and/or the cause of action has arisen, and it is not a necessary 'must' that it has to be taken as a third party proceeding.* (Emphasis added.)

PRONOUNCEMENT

[142] For the reasons adumbrated above, it is plain and obvious that the first and second defendants' statements of claim against the third parties do not disclose a reasonable cause of action and are therefore, obviously unsustainable against the third parties. The first and second defendants' claims against the third parties are frivolous and vexatious and for the reasons referred to above, it is plain and obvious that the irrefutable inference is that the first and second defendants' claims against the third parties are unnecessary and designed to cause embarrassment and delay to the trial of the main action. To allow the action to continue against the third parties would be an abuse of the court's process.

[143] Therefore the court struck out the third parties notices and the statements of claim filed by the first and second defendants against the third parties in both the suits. Costs to be paid by the first and second defendants to the third parties and to be taxed failing agreement.

Third party notices and statements of claim struck out with costs to be taxed failing agreement.

Reported by Kohila Nesan